THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 23671/09
CASE NO: 17189/09

In the matter between:

PRIMILDA JACOBS	First Plaintiff
CAROLINA CHRISTINA HENDRICKS	Second Plaintiff
and	
TRANSNET LTD/METRORAIL	First Defendant
THE SOUTH AFRICAN RAIL COMMUTER CORPORATION LTD	Second Defendant
MARTIN KERSHOFF	Third Defendant

JUDGMENT delivered this26th day of July 2013

NDITA; J

[1] On 16 November 2006, at approximately 07h10, a Metrorail train 3208 type 5M2A, en route from Strand to Cape Town collided with a, Mitsubishi Canter truck at the Croydon level crossing between Firgrove and Faure in the Stellenbosch area. The truck was conveying approximately 31 passengers, 19 of whom were killed and 12 injured to the Faure Wine Farm. The two plaintiffs were among those injured.They both are adult female farm workers of Riverlands, Western Cape. The first defendant is Metrorail, duly formed in terms of section 32 of the Legal Succession to the South African Transport Services Act No.9 of 1989, as amended, as a business of Transnet Limited, a public company incorporated in terms of the Companies Act 61 of 1973, with its principal place of business at 1 Adderly Street, Cape Town. The second defendant is the South African Rail Commuter Corporation Limited, a statutory company established in terms of Act No. 9 of 1989. The third defendant is an adult male labour broker and employer of the driver of the truck. It is common cause that the Road Accident Fund has admitted liability on behalf of the insured driver of the truck and has paid the limited amount of R25 000,00 to the plaintiffs in terms of section 18 of Act 56 of 1996.For this reason, neither the driver of the truck, nor the Road Accident Fund is cited as defendants in the present action. Similarly, a claim for vicarious liability based on the negligence of

the deceased truckagainst the third defendant, has, pursuant to his Special Plea in terms of section 35 of the Compensation for Occupational Injuries and Diseases Act 30 of 1993, been withdrawn and no order as to cost was made.

[2] The plaintiffs pleaded thatthe collision occurred as a result of the negligence of the train driver, Ms Harriet Mxhalisa, acting in the course and scope of her employment with the defendants. The grounds of negligence in terms of the pleadings are that:

1. she failed to warn the truck driver, Mr Gert Zeelie, of the approach of the train either adequately or at all;
2. she drove the train at a speed which was excessive in the prevailing circumstances;
3. she failed to maintain a proper lookout;
4. she failed to act with due care;
5. she failed to apply the brakes of the train timeously, adequately or at all;
6. she failed to avoid the collision when by the exercise of reasonable care she could have done so.

The plaintiffs further pleaded in the alternative that the collision was caused by the first and second defendants on the grounds that:

1. they failed to ensure that a mechanical boom was installed at the level crossing.

2. they failed to ensure that a mechanical boom was lowered when the train approached the level crossing;

3. the prevailing speed limit which they have prescribed is excessive in the prevailing circumstances;

4. they failed to ensure that the speed restriction signage was installed as prescribed;

5. they failed to ensure that the speed restriction signage was consistent;

6. they failed to act with due care; and

7. they failed to avoid a collision when by the exercise of reasonable care they could have done so.

According to the plaintiff's plea, the collision was caused by the joint negligence of the defendants.

[3] The defendants denied negligence on their part and pleaded that the collision was caused by the sole negligence of the truck driver in the following respects:

1 he failed to keep a proper lookout;

2. he failed to keep proper control of the truck;

3. He failed to heed existing warning signs indicating the presence of the level crossing;

4. he entered the level crossing without ascertaining whether it was safe to do so;

5. he entered the level crossing at a time when it was dangerous and/or inopportune to do so.

6. he failed to avoid the collision when by exercising the requisite care and skill he could have and should have done so;

7. he failed to heed the warning siren of the train in question.

[4] In addition to the grounds set out above, the first and second defendants in their pleas allege that on or about 15 May 2006, the first defendant concluded an agreement, in terms of which the first defendant sold to the second defendant the business of providing rail commuter services, including all the assets and liabilities associated therewith. In

terms of the agreement, the first defendant with effect from 26 December 2005, no longer operated as a business unit of Transnet Limited. Consequently, the second defendant assumed the assets and liabilities of the business previously operated by Transnet Limited, thus, the first defendant cannot be held liable for the plaintiffs' claim. . For ease of reference, the first and second defendants will simply be referred to as the defendants.

THE INSPECTION IN LOCO

[5] At the commencement of the trial on 8 October 2012, an inspection in loco was carried out at the railway line to the Croydon level crossing. The inspection started at an underpass constructed under the railway line to Kelderhoff Country Village, a new residential development and continued along the railway line to the Croydon level crossing which is about 1 km away. The following observations were recorded:

1. On the western side of the railway line, in the vicinity of level crossing, is the urban area of Croydon whilst on the eastern side, approximately 200m from the crossing is farmland and a row of houses. On the left hand side of the railway track, about 8 m from the track are houses. Between the houses and the railway track, is a service road. The boundary

wall of the residence on the western side is about 8 metres from railway track but on the eastern side there was no fence or boundary between the railway line and the houses.

2. The first whistle is about 356m from the level crossing and 185m from a sign board indicating a speed of 40km/hour. The second whistle board is 140m from the crossing.

3. At the crossing, there is a stop sign on the tarmac on the Steyne Road. Along the same road, there is a sign indicating a railway crossing and another a stop sign.On the western side of the road, there is a vibacrete wall along the railway line. It is approximately 5.3m from the line of the stop sign painted on the tarmac. On the northern side, the vibacrete wall is about 7.7m from the front of the white line of the stop sign. The front white line of the stop sign on the tarmac is 4.8m from the edge of the railway line.

4. When approaching the level crossing, and walking towards the railway line, the vibacrete wall and bamboo vegetation obscures the visibility of the railway line, depending on where one stopped to observe.

5. On the western side of the crossing is a pole which is about 6.8 m from the railway line.

6. The gate to the Faure Wine Farm is on the eastern side of the level crossing.

THE EVIDENCE

[6] The first witness to be called by the plaintiff is Mr Arend Hendricks, the secondplaintiff‘s husband. His evidence was to the effect on the day in question, he was a passenger in the truck driven by Mr Gert Zeelie. He was amongst the farm workers who were being transported to Faure Farm.He and his wife, the second plaintiff, were seated at the back of the truck next to the flap. There were approximately 28 to 30 people at the back of the truck, amongst whom, were, Mr Jimmy Hendricks and Mr Denzil Cloete.Mr Morne Kershof, the son of the owner of the truck was seated with the driver in front. As they were driving towards the Croydenlevel cross, the truck stopped at the railway line. The witness observed the driver driving forward in attempt to cross the railway line. As the truck was driving over the railway line, Mr Hendricks testified that he saw the train approaching for the first time. Prior to seeing the train, he had not heard a whistlewarning vehicles on the crossing of its impending approach. Mr Hendricks testified that he did not see the train earlier because of branches hanging over the vibacrete wall next to the track. According to Mr Hendricks when he saw

the train advancing, he realised that death was imminent as the truck had stopped on the railway track.He jumped out of the truck. Shortly,the train collided with the truck.

[7] Mr Morne Kershoff testified that he was a passenger in the truck, seated on the cab with the driver Mr Gert Zeelie, who was a new appointee. It wasMr Zeelie who was driving the truck for the first time on that day. According to Mr Kershoff, the truck was in a roadworthy driving condition as it had been serviced the previous day. As they were driving from Klapmuts to Stellenbosch, he observed that Mr Zeele's driving was normal. When they were next to the railway crossing, Mr Kershoff testified that he advised the driver to watch out for the railway line. The truck stopped at a distance of about 8.5 metres from the stop sign of the railway crossing. As the truck had stopped the witness lent down, searching for a clip board and pen out of his bag. According to Mr Kershoff, as they had stopped at the crossing, to his right he was able to see part of the railway line as the overhanging bamboo vegetation obscured it. He looked at the driver to see if he was looking on his right side but observed that the truck had stalled on the railway track. From the stop sign, the truck proceeded to cross the level crossing but stalled on the track. When the witness looked

up, he observed that the driver was trying to switch the ignition on and fiddling with the gears as the train was approaching. Mr Kershoff testified that he opened the door of the truck so that he could jump out but the collision occurred before he was able to. He lost consciousness on impact and sustained serious injuries as a result thereof.

[8] In cross-examination,Mr Kershoffexplained that the cabin of the truck was about 2 to 2 ½ metres long whereas its back was 6 metres. In addition, he explained that although Mr Zeelie was driving the truck for the very first time on that day, he had started driving at 5.30 am and the collision occurred about an hour and half later. Put differently, he, presumablyhad about an hour and half to familiarise himself with the truck's mode of driving. The witness testified that he had not heard the sound of the approaching train. Neither had he heard any whistle or siren. With regard to warning signs on the crossing, Mr Kershoff confirmed that he observed through the windscreen of the truck that there was a stop sign and a board with a cross indicating a railway crossing. Mr Kershoff was unable to explain why the truck driver did not stop closer to the railway crossing. In his own words he said that "*Every driver knows he must stopbefore the stop sign*".

[9] Mr Jimmy Hendricks was amongst the passengers seated on the back of the truck on the day of the collision. He is familiar with the crossing as he had travelled it on numerous occasions prior to the accident. He testified that in his opinion, the crossing is very dangerous as one cannot part of the track because of the wall and overhanging bamboo. In addition, in his opinion, trains travel very fast. Mr Hendricks had even predicted to other people that the crossing would one day be the cause of their deaths. On the day in question, he also did not hear a whistle or the sound of the train.

[10] As is customary, members of the South African Police Services attended to the scene. Warrant Officer Abraham Niemandt arrived at the scene shortly after the accident. He was in charge of the investigation of the collision. In his evidence, he painted a grim and gruesome picture of the manner in which the passengers of the truck were injured, stating that in his 32 years of service, the Croyden level crossing accident was the worst that he had ever witnessed. Because of the magnitude of the accident, it is understandable that it attracted the attention of the media. Mr Niemandt testified that he personally interviewed a certain Mr David Smith, a local resident who was quoted in newspapers as having stated that 10

people had been killed by trains in the Croydon level crossing and despite petitions from the community calling upon Metrorail to fence the railway line, nothing had been done. Mr Niemandt was aware of other incidents of persons killed at the crossing. However, this assertion is unconfirmed as no evidence was tendered to support it. Suffice to state thataccording to Niemand's evidence, nothing was done by Metrorail to upgrade safety at the crossing but a new vibacrete wall had beenbuilt since the accident on the western side of the railway line and the Croydon Township.After completing his investigation, the witness forwarded the docket to the National Director of Public Prosecutions for a determination of whether or not prosecution should be instituted but the NDPP declined to prosecute.

[11] Mr Niemandt conceded under cross-examination that he had no records showing other accidents which had occurred at the crossing besides those reflected in the document entitled *"History of level crossing accidents at the Faure Wine Farm level crossing"*. The document shows that a collision occurred between a train and a motor-vehicle on 28 September 2002, at 9:00 as a result of which two children were fatally injured and the driver of the motor vehicle was also injured, albeit not fatally. The two or three other incidents he had referred to occurred past

Kelderhof on other level crossings, not on the Faure crossing which is the subject matter of this judgment. Mr Niemandt did not dispute the history so reflected and explained that the incident involving a train he earlier alluded to had occurred further down the crossing and is not related to the Croydon crossing. Mr Niemandt further revealed that in the course of the investigation, he obtained statements from various eye witnesses at the scene. According to a statement made by an eye witness, Mr Africa, the driver of the train blew the horn. Mr Niemandt could not in cross-examination confirm for how long it was blown. The report he had compiled formed part of the Road Accident Fund report.

[12] The first plaintiff, in support of the allegations of negligence on the part of the defendants, with regard to more particularly the failure to install mechanical booms and prescribing an excessive speed limit, as well an excessive speed on the part of the train driver, tendered the evidence of a mechanical engineer, Mr Daniel Van Onselen. As is standard procedure, Mr Van Onselen filed a report dated 27 September 2012. Although in his evidence, he makes very little reference to his report, it is in my view, reasonable to summarise his accident reconstruction findings. These findings were made on the basis of the perusal ofthe summons,

photographs, Discovery affidavit, Signing for Railway Crossing document. Mr van Onselen made the following remarks:

"6.4 It would take the train travelling at a speed of 60kph 15 seconds to reach the crossing from the advanced whistle board and 7,5 seconds from the second (closest) whistle board.

6.5 The stopping distance of the train is very much in excess of that of a motor vehicle travelling at a similar speed, due to the lower coefficient of friction of the cast iron brake blocks on the smooth steel wheel rolling surfaces, coupled with the relatively narrow contact area of the steel tyre on the steel rail."

[13] His evidence constituted largely comments on the report compiled by the Railway Safety Regulator as well as the defendants' expert witness report,compiled by an engineer, Mr Roodt. It remains to be said that in these proceedings, the experts had not met, prior to the hearing, and in consequence, no joint minute indicating the areas of convergence or dissent was filed. I think in order to fully comprehend the testimony of Mr van Onselen, it is prudent to, at this stage, summarise the findings of the Railway Safety Regulator.

[14] On the same day of the occurrence of the accident, the Railway Safety Regulator despatched inspectors to the scene to investigate the probable cause of the accident and made the following findings:

1. The primary cause of the accident was human error on the part of the truck driver, possibly aggravated by the vehicle condition and overloading;

2. The train was exceeding the allowed section speed by approximately 6km/h prior to the application of the brakes.

3. The train driver disobeyed standard operating procedures by not applying emergency brakes when she realised that the train was not going to clear the line.

4. An analysis of the on- board recorder reveals that the energy of the collision would have been reduced by approximately 40% had the train driver applied the emergency brakes when she realised that the truck was not going to clear the line.

The current practice is that the responsibility for averting a potential level crossing collision lies with the road user alone and is not shared with the train driver. For example, the road driver must stop, check for oncoming trains, judge if it safe and proceed.

5. Apart from having the road knowledge and sounding the hooter, there are no special procedures for train drivers when approaching a level

crossing. Only in the event of obstruction is the driver required to apply emergency brakes by which time is usually too late to avoid a collision.

6. The road interface is considered to be a high risk. It is therefore disconcerting to note that the operator deems it appropriate to allow trains to operate ata section speed of 90km/h in an environment of unprotected level crossings.

[15] The report reflects that the section speed is 90km/hour and a whistle board is positioned 125 metres and 400 from the crossing. With this background in mind, I revert to the evidence of Mr van Onselen.

[16] Mr van Onselen aligned his views with the findings of the Railway Safety Regulator. During his testimony, he referred to chapter 7, of the Metrorail Manual entitled 'Signing for Railway Crossing' which states that:

" Due to the extremely high risk of fatal and serious injury casualties in a motor vehicle – train collision it must the objective of all authorities concerned to achieve firstly the highest measure or conformity with recommended standard signing practices at railway crossings, and secondly high standards of maintenance of signs, markings and signals once installed.

It should be noted that trains in South Africa are now capable of operating in what can be termed as 'high' speeds in comparison to past practices. The speed of a train is very difficult for the driver of the vehicle to judge. An increase in operating speed will not be obvious to drivers and their perception of the speed differential between a high speed train or a slower speed train is likely to be poor. It is therefore important that signing relevant to railway crossings be of a very high standard and that authorities have an ongoing commitment to maintain awareness of drivers as to the risks involved."

[17] Mr van Onselen testified that when he visited the scene of the accident, he observed that there were dwellings right up to the edge of the track and there was no protection for the people using the crossing to reach the other side of the track. In his opinion, the view of the track on the part of both drivers was obscured by a wall and a wooden pole which was in line with where the truck driver would have been seated. Similarly, the train driver would not have been able to see the obstruction on the tracks. Much of the witness's evidence centred around a 30km/h speed restriction board which he alleged was mandatory. It is common cause that subsequent to the collision a 40 km/h board was erected whilst the 30 km/h restriction remained in place. In his view, this is so because there was no subsequent cancellation of the 30km/h speed limit, the train driver had not observed the limitation, and had she done so, she would have been able to avoid the

collision. Mr van Onselen was thus of the view that the train was travelling at three times the permissible speed limit. According to his evidence, if the train had been travelling at 30km/h the stopping distance would be 43.8 metres and it would take 5.2 seconds.In addition, the major reason for the 30km/h speed restriction may well have been that crossing was dangerous to the inhabitants living close to the railway line. However, the witness acknowledged that it is mandatory for a driver of a motor vehicle to stop before crossing a railway intersection, equally the train driver ought to sound siren at both whistle boards, and that if there is no obstruction, the train driver has a right of way. Stated differently, both drivers share the responsibility to keep a proper lookout.Mr van Onselen was referred to the a report compiled by Mr L C Vockerodt, entitled *"Analysis of Date CapturedBy Motor Coach Monitoring System (The Black Box)"* and he confirmed that brake application occurred when the train was travelling at 96km/h and this brought to a standstill over a distance of 510 metres. On impact the train was travelling at 87.3 km/h. According to the report, the accident occurred at 07.15 and the data reveals that at 7.11:25 the train driver applied an emergency the Deadman featurebrake ("DFM") but before this point the train was moving at 96km/h in coasting mode, that means it neither powering nor braking. It came to a standstill at 07.11:58. Mr van

Onselen was also referred to the recommendations made by authors of a report compiled by du Metier (Pty) Ltd, a company commissioned by the Road Accident Fund to investigate the accident. He specifically agreed with the statement that the speed section at the Croyden crossing appeared to be too high for the uncontrolled level crossing and its position in relation to the property fences. He was referred to the findings of Du Metier which are as following:

"1. The signals were in position and functioning.

2. The whistle boards were at their prescribed positions.

3. There were no booms and the level crossing was uncontrolled.

4. The section appears to be too high for the uncontrolled level crossing and for the position of the level crossing in relation to the property fences.

5. Speed restriction signage at the railway line is not consistent and not installed according as prescribed.

6. This level crossing can be protected by means of booms. Especially as the level crossing is close to walls that reduce the sight distances on approach to the level crossing.

7. An alternative would be introduce the section speed of the train in the area of this level crossing. Such an alternative would in this case have reduced the magnitude of the impact, but the incident would have still

occurred. A speed restriction of 50km/h or less would be acceptable for this specific section, but such a low speed would be impractical in terms of service delivery for the transport of passengers.

[18] Central to the allegation of negligence against the defendants is the failure of the train driver to apply the emergency brakes instead of the 'DMF'. Mrvan Onselen explained that an application of the DMF brake involves the disengaging of the accelerator and activating the "dead man's handle" causing thetrain to automatically stop at a lower acceleration. The activation of this kind of braking system necessitates that the train driver leave the controls of the train of in order for it to stop. Mr van Onselen was of the opinion that the activation of the emergency brakes would have been much more effective in preventing the collision. This was so because by executing the DMF brake instead of the emergency brake, the train driver lost valuable braking time, thus failing to bring the train to a stop before the collision. Stated differently, the application of the emergency brakes would have reduced and retarded the speed more quickly than the DMF brake. This assertion is in line with the report of the Railway Safety Regulator to the effect that the train driver disobeyed standard operating procedures.

According to Mr van Onselen, in an emergency, the train driver must apply the emergency brake.

[19] It was put to Mr van Onselen under cross-examination that the 30km/h speed restriction he referred to is in his evidence in chief was operative for 1.5 km and was as such not a permanent sign. The witness was adamant that the Chapter 7 of the Signal Manual supported his contention that a speed 30km/h was operative on the track. However, when it was pointed out to him that the Signing Manual made no such reference , he conceded. He was also not aware of the reason for the erection of the 40km/h board pursuant to the accident, whilst the 30km/h remained in place. It transpired during cross-examination that Mr van Onselen was not relying on any authority with regard to exactly when the a train driver must apply the DMF, but he acknowledged that the feature is the fastest way of applying brakes. Mr van Onselen's testimony with regard to the two train braking mechanism must be understood in the context of the fact that he did not do any calculations to determine whether an emergency brake application would be faster than a DMF application.

[20] The second plaintiff in an attempt to demonstrate the negligence alleged in the pleadings on the part of the defendants, led the evidence of Mr Timothy Spencer, a town planner. In line with standard procedure, Spencer confirmed the contents of his report wherein he explained that the rural nature of the area to the north east of the level crossing and the low key nature of the railway line belie the speed of trains travelling along the section up to 90km/h. According to his evidence, the route to the Croydon crossing involves a number of corners and the stretch of The Steyne Road fromJohannesburg Street describes a gentle right hand curve.The Croydon level crossing is on the urban edge. Mr Spencer testified that the south west boundary of the railway reserve is bounded by high precast concrete walls which impede visibility of the railway line from the north and south. In his opinion, given the fact that the level crossing is classified as “a high speed rail traffic” for high speed trains up to 120km/h,it would be reasonable to employ additional warning signs. He however, acknowledged that the mode of control for urban railway crossings will be dictated by a combination of factors, including the frequency and speed of train movements. In his perspective as a town planner, had the train been travelling at 40km/h, it would have stopped in less than 100m upon the

application of the DMF brake. This view is in line with the calculations and braking tables reflected in the defendant's expert witness, Mr Roodt.

[21] Mr Spencer accepted during cross-examination that the Croydon level crossing was classified as a 3A level crossing.The minimum protection afforded to such a classification is a stop sign and railway level crossing sign.

[22] The second plaintiff led the evidence of Mr Eric Nkwinika, an engineer employed by the Railway Safety Regulator as principal railway inspector. Mr Nkwinika is one of the persons who attended to the scene on the day of the collision on 13 November 2006. He testified that he observed a board reflecting a 30km/h speed restriction for trains travelling on the Faure railway line. According to his evidence, the applicable speed limit on the route was 90km/h and there was no speed restriction. He was unable to explain the why there was a 30km/h speed restriction. He assessed the sight distance of the driver at 700m. In the course of the investigation, the witness interviewed the train driver, Ms Harriet Mxhalisa, who stated that she observed the truck approaching the level crossing in a jerking manner when she was driving past the first whistle board. According to Mr

Nkwinika, the train driver advised that she started sounding the train siren but the train stopped on the track. She applied the DMF brake, vacated the cabin and ran into the passage in anticipation of the collision. Mr Nkwininka's evidence confirmed the findings of the Railway Safety Regulator which have been already outlined in the evidence of Mr van Onselen. One of the people interviewed at the scene was one Mr Africa who also stated that the truck approached the crossing in a jerking fashion and eventually stopped over the railway crossing. Mr Africa further indicated to the investigating team that the train driver sounded the siren twice. The recommendations made by the Railway Safety Regulator as testified to Mr Nkwininka are as follows:

1. That the level crossing be eliminated and the road closed or that a bridge be built.
2. A combination of booms and flashlights be installed.
3. The speed be reduced to 40km/h.

According to his evidence, had the above measures been implemented prior to the accident in question, the collision could have been avoided.

[23] Mr Nkwinika testified that in terms of the Metrorail planning and operating procedures, a train driver is expected to apply emergency brakes

to bring a train to a stop in an emergency.According to Mr Nkwininka, DMF brakeis a “vigilante” brakes designed to keep the driver “awake” or “active” or “vigilant”. Activation of the DMFrequires the driver to vacate the cabin, and thus it provides greater safety to the train driver, whereas the emergency brakes require has a lever that can be pulled into brake position. Under cross-examination, it transpired that there is no rule that prevents a train driver from applying the DMF in an emergency situation.. When questioned about the statement in the report stating that had the driver applied emergency brakes, the impact would have been reduced by 40%, the witness stated that he did not do any calculations based how long it would take for the brakes to operate once the DMF is applied. He testified that the time interval for brakes to kick in depends from train to train.

[24] With regard to signage on the classified route, Mr Nkwininka confirmed that the signage at the level crossing constituted sufficient warning for the truck driver to stop. He further testified that the level of protection on different classes of level crossings dependedon the requirements for that particular ordained class. In the case of the 3A classification of the train route in question, the requirements of the signing manual had been complied with.

[25] The second plaintiff called its own expert, Mr Conrad Lotter, a mechanical engineer employed by Du Metier (Pty) Ltd. Mr Lotter was commissioned by the Road Transport Management Corporation, a body administered by the Transport Department to investigate the cause of the collision on 13 November 2006. The witness confirmed the contents of the report. The layout of the scene of the accident as outlined by him is not in variance with the observations made during the inspection loco. Mr Lotter further explained that the weather conditions at the time of the collisions were clear and dry. Regarding the occurrence of the accident, Lotter relied on statements obtained from witnesses by members of the South African Police Services and the Railway Safety Regulator. One of such statements was that of Mr Africa, who, as earlier pointed out stated that he heard the train sounding the siren twice before it collided with the truck. According to Mr Lotter, there was a north-westerly wind which would have rendered it unlikely for the driver of the truck to hear the first rain whistle. The report states that the train was in probability already visible to the truck driver for a considerable distance train when he started to cross the railway line.

[26] It is not in dispute that the train was travelling at the speed of 96km/h before the collision and decelerated at a rate of 0.8m/s to a speed of

87.3km/h when the impact occurred. According to the evidence of Mr Lotter, the train was 76m from the area of impact when the decelaration started. It came to rest approximately 405m from the area of impact. The time taken from the position before the brakes were applied to the area of the collision can be calculated as approximately 3 seconds. It will be recalled that according Mr Roodt, the defendants' expert engineer, the braking of the train commenced at a distance of 105m from the point of impact. Whilst Mr Lotter readily accepted that Mr Roodt's estimate was reasonable, he (Mr Lotter) testified that according to his calculations, the distance was marginally shorter.

[27] In relation to the braking mechanism of the train, Mr Lotter explained that a train is fitted with three forms of braking system. First, the service brake, allows the train driver to have complete control and maintenance of the speed, second, the emergency brake, is the fastest full braking force, and third, the DMF, which kicks in as soon as the train driver is for some reason not in control of the trains, for example, when he/she is unconscious or has a heart attack. However, there is a 3 to 5 seconds delay for the DMF to come into operation. The design of the braking system varies from train to train. This aspect of Mr Lotter's evidence must be understood in the

context of what was elicited in cross-examination. Mr Lotter stated that he did not test the 5M2A train model involved in this collision as the testing is undertaken by Transnet on all Metrorail trains. For this reason, he agreed that he was not in a position to say whether there is a 4 second braking delay in the 5M2A model. Neither was he certain that the DMF brake kicks in earlier or not.

According to Mr Lotter, if the train had been travelling at 40km/h and had commenced braking at a deceleration rate of 0.8m per second, it would take 77m to come to a stop, and a deceleration rate of 0.73m per second it would take 84.5m. Mr Lotter was of the opinion that at 30km/h there would have been no impact as the train would have stopped before reaching the truck, and if the emergency brake, instead of the DMF had been applied at a speed of 40km/h, the train would have stopped 43m from the crossing. Furthermore, the application of the Deadman's brakes resulted in the train travelling for 4 seconds unaffected by the brakes and had the emergency brakes been activated, that 4 seconds would have been saved. Similarly, had the emergency brakes been applied when the train was travelling at 96km/h, this would have reduced the force of the collision by 37% .

[28] One of the issues raised in this trial is whether or not the driver of the train was, in terms of the 30km speed restriction board obligated to reduce the speed to that level. Mr Lotter testified that at certain sections of the railway track, for example, curves, permanent restriction boards lower than the prescribed section speed, are erected.In this instance, in line with the evidence of other witnesses and expert reports, there was a 30km/h speed restriction board which seemed to fit with the location of the level crossing.. He described it as a white board with a cross. According to Mr Lotter's evidence, there was up to the crossing, no subsequent board erected to cancel the 30km/h speed restriction. That in essence suggested that train should have been up to the level of crossing operated at a speed of 30km per hour. This so particularly in the light of the fact that a train driver is obliged to regulate the speed of the train so that it never exceeds the maximum speed applicable to the portion of the line concerned. In similar vein, Mr Lotter conceded that a motor vehicle driver approaching a railway crossing should move up to a position on the road where he is able to observe the train track.

[29] With regard to the 30km/h speed restriction, Mr Lotter revealed under cross-examination that he could not say with certainty when that speed

became operative, neither did he make any enquiries about a cancellation board. He was referred to the Metrorail Information document, depicting a30km/h temporary speed restriction board directing a train driver to reduce speed and be prepared to travel, 1.5 km ahead at the speed indicated on the warning board. He was adamant that where there is a speed restriction it must be followed by a cancellation. He however, revealed that train drivers get oral instructions every morning where there are temporary speed limits relating to maintenance of the railway track and temporary speed limits applicable. According to Mr Lotter, the absence of a cancellation meant that from Firgrove to Faure station the speed limit of 30km/h was applicable regardless of the fact that the speed applicable in the entire railway track was 90/h. He further conceded that it is only at the beginning of the restriction board that the train driver should drive at the reflected speed.

[29] It will be recalled that the plaintiffs in the pleadings allege negligence on the part of the defendants on the basis that they failed to ensure that adequate protection on the crossing by not installing a barrier or boom, or designing it in such a way that approaching vehicle had a clear view of the crossing, or to impose and enforce an adequate speed restriction or build a

bridge over it. The protection afforded on any given crossing according to the Metrorail information depends on the classification of the crossing. The protection relates to the number of signs that must be put up, placing and classing. According to Mr Lotter's report, although there were no mechanical booms that lowered when a train is approaching at a section speed of 90km/h, the signage appeared to be sufficient to warn of the railway crossing. Under cross-examination, Mr Lotter was unable to say whether the level crossing was assessed individually. He also did not dispute the classification and the protective measures that ought to be in place at the crossing.

[30] After tendering the evidence of Mr Lotter, the second plaintiff also closed her case.

[31] The defendants called two witnesses, the driver of the train and its expert engineer, Mr Roodt. Mr Roodt's report and reconstruction is largely based on statements of eye witnesses and analysis of the data. He referred to the Signing for Railway Crossings and testified that the purpose of the document is to give criteria of when to upgrade the standard layout of a crossing. According to his evidence, farm accesses are low volume and the

level of protection associated with that is class B which was upgraded to a 3A protection. The protection afforded to such a crossing varies between a 3A and 4C and the minimum level of protection is that of a 3A. The requisite signs are a railway crossing warning sign and a stop sign. He described the track in question as a single high speed line (section speed 90km/h) with excellent sight distance. He further explained that in order to cross a railway track, a driver must have sight distance, and if he/she can see in 350 metres, that is considered as excellent sight distance. Sight distance and accident history are one of the factors that are considered to trigger an upgrade. Mr Roodt testified that the Croyden crossing had a sight distance of more than 400 metres and the last accident occurred in 2002. In his opinion, these two factors do not trigger an upgrade. The witness testified that an upgrade becomes necessary when there has been three accidents in one year or five accidents within a three year.According to Mr Roodt, the level of protection afforded to the crossing was appropriate.

[32] Mr Roodt confirmed that according to witness statements, the train driver sounded the whistle. Mr Roodt testified that the train travelled at 96km/h on a 1.25% downgrade and the Deadman Brake Application was activated. The speed reduced to a standstill at 510 metres, and the

resultantconstant deceleration was 0.7 metres per second. The witness accepted that the actual positioning of the whistle boards at the time of the collision, as stated out in the Du Metier report was 360m and 140m. In his opinion, the whistle boards conformed to specification as on the railway line, they are typically located at 125 m minimum and 375 to 400m from the level crossing. Given that the line from Forgrove Station from which the train had departed runs from 5 to 4,25 km downhill and the train picked up speed of up to 96km/h in 26.6m/s, the truck would have had to clear the railway crossing by approximately 1 second. According to the witness, even if the train had been operated at a speed of 90km/h, the outcome of the accident would have been the same. This is so because the difference in time at a speed of 96km/h versus 90km/h over a distance of 140 metres is 0.35 seconds. Thus, according to the witness, the accident would not have occurred but for the stalling of the truck on the railway crossing as the train driver had acted reasonably when the emergency became apparent.

[33] It will be recalled that after the collision, a speed restriction of 40km/h was put up. Mr Roodt was cross-examined on the fact that his report failed to mention the 40km/h restriction. He explained that when he reconstructed the accident scene, he had to have regard to the conditions of the railway

track as they were at the time of the collision. Besides, so he testified, the commuter line had been in operation for approximately 40 years without triggering any of the criteria for the section speed or level crossing to be reviewed. The witness admitted that he did not do a cost benefit of analysis but said that it had been done on a network level not individually and at that stage, there had been only once incident where two people had been killed. In addition, Mr Roodt admitted that had the train driver seen the truck at the first whistle board, the collision would have occurred albeit at a much lower impact because the slower the speed of the train, the bigger is the margin of safety for vehicles crossing the railway line. Similarly, had the train been operated at the current speed restriction of 40km/h for up to 200m to the crossing, no substantial delay would be suffered by commuters because it would have taken 18 seconds to reach the crossing instead of 8 seconds at 90km/h. At the speed of 40km/h, the application of the DMF would have brought the train to a stop before reaching the crossing. Mr Roodt readily acknowledged what has become a well-known fact, namely, that it is difficult for a motorist to judge the speed of an approaching train.

[34] With regard to the train braking function, Mr Roodt in cross-examination stated that the difference between the emergency brake and

the DMF assumed a delay of 4 seconds,therefore had the emergency brake been applied, the force and the severity of the impact of the collision would have been reduced.

[35] The train driver, Ms Nomava Harriet Mxhalisa outlined the theoretical and practical training she received from 2002 to 2004 before starting to drive the train alone in 2004. Ms Mxhalisa explained that when she reports for duty, she checks the journal to see the route allocated to her. Once the route has been determined, she checks the notices for any restrictions. According to her evidence, there are two whistle boards per level crossing, the first one is in 400 metres whilst the second is in 125 metres. The second whistle warns the driver that in 125 m, there will be a level crossing. The witness confirmed that the section speed at the track to Croydon level crossing is 90km/h, however, there are speed restriction boards which indicate that at certain parts of the track, the permissible speed is 30km/h for a1.5km. The third board that appears after the second whistle board cancels the 30km/h speed restriction and allows a train driver to revert to the section speed of 90km/h.Ms Mxhalisa testified that the second speed restriction board is located on the entrance of the platform to Faure station.

Both the second and third boards are beyond the railway crossing where the accident occurred.

[36] Ms Mxhalisa testified that on the day of the collision, she was driving the train from Firgrove to Faure station. According to her evidence, she drove past the first whistle board and sounded the siren. At that stage, there was no truck on the railway track. She proceeded to the second board and when she drove past it, there still was no truck on the crossing. The witness testified that when she approached the level crossing, the truck got onto the railway track. Ms Mxhalisa said that she was shocked when she saw the truck on the track and immediately applied emergency brakes, left the cabin and ran to the back of the train for her safety. She stated that when she saw the train for the first time, it was moving. She further explained that the emergency brakes she applied were known as the Deadman's feature. The train collision with the truck occurred after she had vacated the cabin. The witness explained that before the collision, the train was in a 'coasting mode' at 96km/per hour. Ms Mxhalisa explained that 'coasting' means that the train driver closes the master controller and does not give power to the train. That in essence means that the train is not motored and it cruises. According to the witness, because the gradient on

the track towardsFaure station is down, the speed of the train rises when it is moving even when it is in a coasting mode. On the day in question, she stated that she blew the whistle for three seconds warning the people that the train was approaching on the first whistle board. At the second whistle board, she blew a continuous whistle. The siren in that particular train, according to the witness, is located on the floor.

[37] Regarding the manner in which the accident occurred, Ms Mxhalisa was adamant that there was nothing else she could do to avert the accident besides applying the DMF as the truck appeared at a very close range. She further stated that the application of the DMF causes the train to cut the current and reduce the speed to zero. As far as she is concerned, the DMF works immediately when a train driver releases the steering wheel.

[38] Ms Mxhalisa under cross-examination stated that the model train is fitted with normal brakes, also known as ‘vaccum’ brakes and emergency brakes. Her evidence was that the emergency brake is coupled to the steering wheel and to activate the function, one must not pull the handle as was suggested, but must push it down. It was put to her that the impact of the collision would have been reduced by 40% if she had applied

emergency brakes but she was unrelenting in her stance that there is only the DMF to apply in emergency. The witness was confronted with the contents of a statement she made to the police wherein she stated that she saw the truck on the track when she was driving past the first whistle board, contrary to her evidence in chief to the effect that she was driving past the second whistle board when she saw the train for the first time. Ms Mxhalisa stated that,that portion of her statement was incorrect because she told the police officer who wrote down her statement about two whistle boards, but the statement reflected only one whistle board. The relevant part of her statement reads as follows:

"Arriving at the 1st whistle board, I sounded the siren. While doing so I saw a truck approaching the crossing. My siren was still is sounding. The truck was moving very slowly and I drew all the brakes."

It was further suggested to the witness that she should have reduced her speed earlier in anticipation of the 30km/h restriction but she explained that there was more than enough time for her to slow down in order to comply with the applicable speed limit as the restriction board of 30km/h begins at the Faure platform, which is a long way beyond the level crossing.

[39] Ms Mxhalisa was cross-examined on personal records of performance as a train driver showing that during 2003 to 2004, she was

subjected to disciplinary hearings for misconduct as a train driver leading to a poor rating in 2004. This aspect of cross-examination was strenuously opposed by counsel for the defendants on the basis that it constituted character evidence, a factor not relevant to the proceedings at hand. It was allowed provisionally,depending on its bearing on the facts of the case. As it returned out, the incidents referred to in cross-examination are not of evidential value.

[40] After presentation of Ms Mxhalisa, the defendants closed their case.

APPLICABLE PRINCIPLES

[41] With the evidential background in mind, it must be determined whether the plaintiffs showed that the defendants were negligent. If they have failed to discharge the onus they bear, the action must fail. In order to succeed in this action, the plaintiffs must prove on a balance of probabilities an act or omission, wrongfulness, fault, causality and patrimonial loss on the part of the defendants. With regard to the latter, at the commencement of the trial an order was made, by agreement between the parties and in terms of Rule 33 (4) of the Uniform Rules of Court, that the issue of quantum be separated from the merits and that the trial proceed on the

merits only. The principles of delictual liability applicable in the present matter although trite, must be restated as revisited in *Ngubane v The South African Transport Services* 1991(1) SA 756 (A) as follows:

"Liability in deflect based on negligence is proved if:

(a) a diligens paterfamilias in the position of the defendant –

(i) would forsee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and

(ii) would take reasonable steps to guard against such occurrence; and

(b) the defendant failed to take such steps."

[42] I propose to first deal with the alleged vicarious liability against the defendants arising from the conduct of the driver of the train. Counsels for the plaintiffs argued that despite the train driver's evidence to the effect that she first saw the truck on the tracks when she was driving past the second whistle board, the statement she made to the police shortly after the incident wherein she stated that she saw the truck when she was at the first whistle board at a distance of about 400m is more plausible. This contention suggests that she therefore had sufficient time to react to the impending disaster; and was thus negligent in applying the brakes when she was a mere 100m from the level crossing. It was further contended that the train driver was

negligent in simply leaving the controls of the train thereby allowing the DMF to bring the train to a stop instead of activating the emergency brake. The third leg of negligence imputed on the train driver is based on the submission that she failed to activate the siren, because had she done so, the occupants of the truck would have heard it and observed the train approaching from a distance.

At this point, it is useful to recapture the principles applicable particularly to level crossings. In *Worthington v Central South African Railway*s 1905 T.H. 149 at 150, cited with approval in a number of cases including *Williams v Transnet Limited* 200 JDR 0811 (SCA) p 10 para 11, it was stated that:

"It is the duty of the traveller to look out for and wait for the train. At the same time a condition is attached to the preference which the railway has, and that is that the train ought to give due warning of its approach when it is nearing a level-crossing of this nature, so that persons might stop and allow the train to pass. The train is bound, in my opinion, to give due and timely warning of its approach, and also not be travelling at such an excessive rate of speed that the warning it might give should be of no avail. What is an excessive speed and what is due warning must entirely depend on the special circumstances of each case. Where there are obstructions to prevent persons from travelling along the road from seeing an approaching train, or where there are any other circumstances which would make it difficult to ascertain that a train is approaching, then, of course, better warning would have to be given,

and the train would have to travel at a slower speed. But even if a train in approaching a level-crossing, does not give due and timely warning of its approach, that in itself does not relieve a person who is travelling along the road from the necessity of taking every care in crossing the line. A level crossing must always have a certain element of danger, and any person, before crossing the railway, should exercise due and proper care in order to see that a train is not approaching; and neglect on the part of railway officials in not giving warning of its approach is in my opinion no excuse whatsoever for neglect on the part of anyone travelling along the road. Anyone so travellingis bound to use his eyes and ears, and if he does not use his senses, and so fails to observe that a train is approaching, then he himself is primarily responsible for any injury he may sustain, and which would have been avoided if he had exercised ordinary care."

[43] In order to determine whether the train driver's statement to the police stating that she saw the train for the first time when she was driving past the first whistle board, which is about 400 m, from the crossing, and the basis for this contention, it is necessary to examine the evidence surrounding the contentious issue. The general principles applied in assessing a contradiction between a witness's evidence and a prior statement are succinctly laid in The South African Law of Evidence, Zeffert p 900 as follows:

“The correct approach to any contradictions betweenthe prior statement and the witness’ testimony was, with respect, most usefully summarised by Olivier JA in S v Mafaladiso and Another 2003 (1) SACR 583 (SCA).The headnote in that case, it is submitted, accurately reflects what he said, and was cited by Nepgen J in S v Govender and Another 2006 (1) SACR 322 E. It reads: “The juridical approach to contradictions between two witnesses and contradictions between the versions of the same witness (such as, inter alia, between her or his viva voce evidence and a previous statement) is, in principle (even if not in degree), identical. Indeed, in neither case is the aim to prove which of the versions is correct, but satisfy oneself that the witness could err, either because of a defective recollection or because of dishonesty. The mere fact that it is evident that there are self-contradictions must be approached with caution by a court. Firstly, it must be carefully determined what the witness actually meant to say on each occasion, in order to determine whether there is an actual contradiction and what is the precise nature thereof. In this regard, the adjudicator of fact must keep in mind that a previous statement is not taken down by means of cross-examination, that there may be language and cultural differences between the witness and the person taking down the statement which can stand in the way of what precisely was meant, and that the person giving the statement is seldom, if ever, asked by the police officer to explain their statement in detail. Secondly, it must be kept in mind that not every error by a witness and not every contradiction or deviation affects the credibility of a witness. Non-material deviations are not necessarily relevant. Thirdly, the contradictory versions must be considered and evaluated on a holistic basis. The circumstances under which the versions were

made, the proven reasons for the contradiction, the actual effect of the contradictions with regard to the reliability and credibility of witnesses [are to be considered]. The question is whether the witness was given a sufficient opportunity to explain the contradictions – and the quality of the explanations – and the connection between the contradictions and the rest of the witness' evidence, [are] other factors to be taken into consideration and weighed up. Lastly, there is the final task of the trial Judge, namely to weigh up the previous statement against the viva voce evidence, to consider all the evidence and to decide whether the truth has been told, despite shortcomings."

[44] The train driver, Ms Mxhalisa, was adamant throughout her evidence that she saw the train when she was driving past the second whistle board. She stated that she informed the police officer who took her statement about two whistle boards and could not explain why only one whistle board was featured in her statement. According to her evidence, when she saw the truck, it was already very close and she had very little time to react to the impending danger, thus, she applied the DMF. Central to the plaintiffs' contention is whether or not the evidence tendered by the train driver is credible. It is noteworthy that Counsel for the plaintiffs'argument did not cast any serious aspersions on the evidence of Ms Mxhalisa. Although Ms Mxhalisa had approximately two years' experience as a solo train driver, she seemed

to be a reliable witness to me. On the whole, I am satisfied that her evidence was truthful, she endured arduous cross – examination and steadfast and clear in her version of how the accident occurred. I am not aware of any other facts as argued by Counsel for the second defendant, elicited during this trial pointing to the fact that Ms Mxhalisa first observed the truck entering the crossing at a distance of 400m besides the statement she made to a police officer. What has been established though is that she did not apply brakes until 100m from the crossing. Another basis for the contention that Ms Mxhalisa's statement is plausible than her evidence is premised on the fact that she did not mention in her statement that when she drove past second whistle board she sounded the siren whereas in her evidence she stated that she did. On the score, the plaintiff's version is to some extent corroborated by the statement of Mr Africa in the Railway Safety Regulator report.There also is no sound basis for the contention that had the train driver activated the whistle at the first whistle board, one would have expected theoccupants of the truck to have heard it and to have observed the train approaching from some distance away. That the occupants of the truck did not hear the train cannot constitute an unequivocal fact that it was not sounded. It follows from the above reasoning that I accept that the

train driver saw the truck at the second whistle board after sounding the siren twice. In my judgment, the train driver did give adequate warning of her approach to the crossing. Similarly, I consider it reasonable for her to have applied the brakes 100m from the crossing as the second whistle aboard is placed at about 125m from the crossing according to her evidence, that is when she first saw the truck. Whether or not she was justified in activating the DMS is another question, to which I now turn.

[45] The common cause facts relating to the application of the DMF can be summarised as follows:

1. The train was driven at 96km/h in a coasting mode.
2. The track speed was 90km/h.
3. The train driver activated the DMF between approximately 100m from the level crossing.
4. The impact speed was 87.3km/h.
5. After the impact the train came to stop at 510 m further down the track.
6. The difference between the 96km/h and 90km/h.

7. Based on the information from the black box the train decelerated and the impact speed was 87.3km/h.

[46] Accepting for a moment that the emergency brakes would, according to Mr Lotter and Mr Roodt, had they been activated earlier, be more effective than the DMF, it must be equally stated that Mr van Onselen did not do any calculations to determine whether the emergency brakes are infact faster than the DMF. Mr Nkwininka on the other hand acknowledged that there is nothing prohibiting a train driver from activating the DMF in an emergency despite a finding by the Railway Safety Regulator that Ms Mxhalisa did not obey operating procedures when she failed to apply the emergency brakes. He also did not know after how long after the application of the DMF would the brakes operate. According to the train driver, the brakes operated immediately.Different scenarios of what could have happened had the emergency brakes been applied, different speed levels were supplied. I think that the correct approach to this consideration should start with examining whether a reasonable train driver in the position of Ms Mxhalisa and in the prevailing circumstanceswould have applied emergency brakes instead of the DMF. In making this assessment, one

must have regard to what the court said in *South African Railways v Bardeleben* 1934 AD 473 at 480:

"In judging whether there is culpa, the Court must, as nearly as it can place itself in the position of the engine driver at the time when the accident occurred and judge whether he showed that ordinary care which can be reasonably expected from a reasonable man under all the circumstances. The Court must not in any way be affected by the tragic consequences of the accident, nor, on the other hand, must it excuse any carelessness on the part of engine drivers. It must not expect superhuman powers of observation and impeccable discretion on the part of engine drivers, nor must it say to him after the event – "if you had done this more quickly or more accurately", or "if you had perceived this or that more readily, you might possibly have avoided the accident". It is so easy to be wise after the event."

[47] In the instant matter, the train driver testified that when she saw the truck on the tracks, she was shocked, and could do no more than apply the DMF which she believed kicked in immediately. On the evidence tendered, there was very little time to perceive and react in accordance with that perception. If it is accepted that Ms Mxhalisa encountered an unexpected obstruction on the track, it is difficult to envisage a situation where she would have time to weightthe disadvantages of the DMF, and the advantages of the emergency brake. The evidence does not establish that afterrealising the obstruction, Ms

Mxhalisa delayed applying the brakes in anticipation of the truckclearing the railway track in time. It may well be that the emergency brakes would have been more effective in minimising the impact, but it is difficult to come to the conclusion that her conduct in applying the DMF brakes was negligent.

[48] The plaintiffs in the pleadings allege that the driver of the train was negligent in driving at an excessive speed in the prevailing circumstances. I do not think that the speed at which the train was travelling should be considered in isolation of all the other variables. Those variables are inter alia, the condition of the railway track, sight distance, the driver's perception reaction time, the braking as well asthe point of impact. According to the Railway Safety Regulator report findings, the fact that the train driver exceeded the allowed speed limit by 6km/h before the collision is indicative of lack of awareness of the risks associated with a level crossing. Without repeating the evidence of the engineers, Mr van Onselen, Mr Lotter, Mr Roodt and Mr Nkwinika, it can be generally accepted that the higher the speed, the greater the impact. The question that must be posed is what impact the difference of 6km/h had on the occurrence of the collision. Stated differently, would

the accident have occurred in any event even if the train had been operated at the allowed speed of 90km/h.

The Du Metier report states that:

"The train was travelling at a speed of 96km/h before the accident occurred. This higher than the allowed section speed of 90km/h. Due to the slow rate of deceleration of the train, this would have made no difference in the outcome of the event. Even if the section speed was as low as 70km/h, the incident would probably still have occurred. However, the effect of the incident/impact would have been reduced."

[49] According to the evidence of Mr Lotter, at an impact speed of 60 to 90km/h, the probability of death on impact is very high. Mr van Onselen was of the view that if the train had been travelling at 40km/h when Ms Mxhalisa saw the truck driver on the track and had applied the DMF, the train would have been brought to a standstill before the crossing and the accident would not have occurred. The variables are that Ms Mxhalisa's evidence that she sounded the siren at the first and second whistle, is supported by the report of the Railway Safety Regulator and Messrs du Meiter report. In any event, she was entitled to assume that truck driver would respect her right of precedence although she also was expected to keep the truck under observation and

anticipate that the driver did not intend to stop at the crossing. Again, this largely depends on when she first observed it. The facts that have been established are that the truck entered the level crossing, jerked and stalled on the track as the train was approaching and at impact the speed was 87km/h. There is no explanation of why the truck stalled on the tracks, but it can be assumed from the evidence of Mr Kershof that, that was due to inexperience of the truck driver as this was his first day to drive the truck and he seemed to struggle with engaging the gears. In addition, the evidence sufficiently establishes that there was no mechanical fault that could have caused the truck to stall. The truck driver was under an obligation to look out for approaching trains and if circumstances existed that hindered his views, he ought to have driven upwards the track to ensure that before crossing, he had full view of the track. The principle set out in *Dyer v SAR* 1933 AD page 10, that a train driver has a right of way and its speed cannot be decreased at every crossing so as to make sure that no collision will occur has long been accepted as part of our law. Similarly, in *Pretoria City Council v SAR & and Harbours* 1957 (4) SA 333 (T) at 338,it was reaffirmed that a train driver is under no duty to travel at such a speed that, in the event of the crossing being obstructed, he can stop between the train and the point

where the crossing comes into view and the obstruction. Taking into account all of the evidence and the variables, I cannot find it proved that the speed at which the train was travelling is the cause of the accident. The evidence clearly shows that the train driver could not have been able to avoid the accident even at a lesser speed. There, therefore, is no basis for holding that the train driver was negligent solely on the basis of operating the train at 96km/h before the collision. On the contrary, the driver of the truck had been negligent in crossing without satisfying himself that no train was approaching. If the vegetation and vibacrete wall had obscured his view, he should at least have heard the train whistle. This I say because it is clear from the Railway Regulator report that Mr Africa, who was driving on the service road which is slightly further from the track than the truck was, heard the whistle on two occasions. The truck driver was entitled to cross the track only after he had satisfied himself that no train was approaching.

[50] It remains to be said that during the trial, the plaintiffs' stance seemed to be that the train driver ought to have reduced the speed to 30km/h, in line with the 30km/h reflected on the restriction board. In argument, the second plaintiff did not pursue this point understandably

so, given that it is clear from the evidence of the train driver, Ms Mxhalisa that the 30km/h restriction was applicable for 1.5 km, a distance which did not stretch to the level crossing point.In fact, according to Ms Mxhalisa, this was not a permanent speed restriction board. The Metrorail Information document also refers to a temporary speed warning restriction board indicating that the train driver must be prepared to travel at the restricted speed for 1.5km. It is equally clear from the evidence of Mr Lotter that the 30km/h restriction did not apply to the section prior to the level crossing. The plaintiffs' allegation of negligence against the defendants is based on their failure to restrict the section speed of 90km/h at the level crossing and the pleadings make no reference to the 30km/h restriction. Put differently, the plaintiffs in their own pleadings acknowledge that the section speed is 90km/h and is unrestricted up to the point close to the level crossing.

[51] I now turn to the negligence imputed on the defendants for failure to put a barrier or mechanical boom at the crossing, or ensure that it was lowered.

[52] The plaintiffs in their plea alleged that the defendants were negligent in that they failed to keep sight lines clear and also prescribed a speed for trains which was excessive. In addition, the defendants failed to ensure that the speed restriction was installed as prescribed and consistent. In short, the defendants failed to take positive steps to prevent the occurrence of the accident whereas the *boni mores* of the community created a legal duty to act positively.

[53] With regard to level crossings, Cooper, *Delictual Liability inMotor Law* at page 216, states that:

"There is no statutory provision which imposes a legal duty upon the body in control of a level crossing to employ an attendant or to erect either gates or booms or display warning devices at level crossings. But the absence of statutory obligation does not relieve the defendant of the duty to do so if reasonableness and society's legal convictions or feelings (boni mores) require it. Where a level crossing passes through a populous suburb the defendant is under a duty to erect adequate warning devices, booms or gates and/or employ an attendant."

It is trite that in the absence of an established legal norm or a recognised ground of justification, wrongfulness is determined according to the criterion of reasonableness with reference to the legal convictions of the community as established by the courts. The test is objective and

based on all the facts of the particular case. (See *Minister of Law and Order v Kadir* 1995 (1) SA 303 (A).In *Pretoria City Council v De Jager* 1997 (2) SA 46 (A) at 55H-56C the court stated thus:

"The Council was obliged to take no more than reasonable steps to guard against foreseeable harm to the public. Whether in any particular case the steps actually taken are to be regarded as reasonable or not depend upon a consideration of all the facts and circumstances of the case. It follows that merely because the harm which was foreseeable did eventuate does not mean that the steps taken were necessarily unreasonable. Ultimately the inquiry involves a value judgment."

The approach to be adopted in making this value judgment is summarised in *Ngubane* at 776 F-J to 777 A-C as follows:

"Whether a diligens paterfamilias in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend on the circumstances of each case. No hard and fast basis can be laid down. Hence the futility, in general, of seeking guidance from the facts and results of other cases."

(Kruger v Coetzee 1966 (2) SA 428 (A) at 430 E-G)

As regards the requirements in para (a) (ii) above in this judgment, it acknowledged that reasonable steps are not necessarily those which would ensure that foreseeable harm of any kind does not in any circumstances eventuate. The contributor (Prof JC van der Walt) in

Joubert (ed) The Law of South Africa vol 8 sv “Delict” para 48 comments in this regard that:

‘Once it is established that a reasonable man would have foreseen the occurrence of foreseeable harm, the question arises whether he would have taken measures to prevent the occurrence of foreseeable harm. The answer to depends on the circumstances of the case. There are, however, four basic considerations in each case which influence the reaction of the reasonable man in a situation posing forceable risk of harm to others: (a) the degree and extent of the risk created by the actor’s conduct; (b) the gravity of the possible consequences if the risk of harm materialises; (c) the utility of the actor’s conduct; and (d) the burden of eliminating the risk of harm.’

The first two considerations are recognised and discussed in the well-known and oft-quoted passage in Herchel v Mrupe 1954 (3) SA 464 (A) at 477 A-C, which is as follows:

‘No doubt there are many cases where once harm is foreseen it must be obvious to the reasonable man that he ought to take appropriate avoiding action. But the circumstances may be such that a reasonable man would foresee the possibility of harmbut would nevertheless consider that the slightness of the chance that the risk would turn into actual harm, correlated with the probable lack of seriousness if it did, would require no precautionary action on his part. Apart from the cost or difficulty of

taking precautions, which may be a factor to be considered by the reasonable man, there are two variables, the seriousness of the harm and the chances of its happening. If the harm would probably be serious if it happened the reasonable man would guard against it unless the chances of its happening were fair or substantial. An extensive gradation from remote possibility to near certainity and from insignificant convenience to deadly harm, can by way of illustration, be envisaged in relation to uneven patches and excavation in or near ways used by other persons.'

[54] It is common cause that the road drivers are warned of the level crossing by a stop sign and a level crossing warning sign. According to the Railway Safety Regulator report, this complies with the requirements of Chapter 7 of the South African Road Traffic Signs manual. However, the report reached a finding that the signage does not adequately address the risks. It can be accepted that the risk of fatal injury resulting from a collision with a train is obvious. To mitigate this risk, the evidence is that the Road Traffic Signs Manual was commissioned in 1999, in terms of which the level of protection to be afforded to this crossing was assessed and classified to 3A to 4C. The classification is informed by amongst other things, development of the area of the crossing and the number of accidents. According to the evidence of Mr Roodt, the commuter line has been running for 40 years and during that period,

nothing triggered the review of the level crossing or the section speed. The one incident where two people were killed was in 2002. This much is obvious from the accident report the contents of which have not been seriously put in contention. In fact, Mr Niemandt, the Warrant Officer who was at the scene of the accident shortly after its occurrence confirmed that the other incidents involving a train had occurred beyond the Faure station. It was contended on behalf of the second plaintiff that there had been a history of previous accidents on the crossing which had resulted in a petition drawn up by local residents in an effort to persuade the defendants to introduce additional safety measures. Thus, the *bonimores* can be discerned from the petitions by the members of community calling for an upgrade of the crossing. Newspaper articles depicting the attitude of the community towards the crossing referred to previous complaints about the crossing but no solid or factual evidence supporting the contention that the community had long been complaining about the crossing was presented. The complaints referred are in fact comments made by members of the community in newspaper entitled “In die nus “ on 15 November 2006, two days after the collision that is the subject matter of this trial. The plaintiffs placed much emphasis on the fact that the speed limit towards the crossing was

ultimately reduced to 40 km/h after the collision and alleged that it ought to have been clear to the defendants before the accident that the speed restriction of 90km/h was excessive. I am constrained to find negligence on the part of the defendants based on measures taken after the occurrence of the collision. Foresight to know what seems obvious in hindsight does very little to bolster the plaintiff's case. I am thus unable to find on a balance of probabilities that the plaintiffs have discharged the onus of proving negligence on the part of the defendants.

[55] Counsel for the first plaintiff attempted to find support for liability of the defendants on the decision in *Harrington v Transnet* 2010 (2) SA 479 (SCA). In my view, the reliance on this dictum is misplaced for two reasons. First, the facts are entirely different and no parity of reasoning could elevate and equate them to the facts of the present matter. In the *Harrington* matter, two security guards who were employed by Kuffs Security to guard the rail network and train stations were patrolling the electric cables in the area between Woodstock and Cape Town stations. There were no trains scheduled after 22:00 and the rail service did not operate until 04:00 the next morning. However, Metrorail sent an unscheduled train down the line for repairs without giving any warning to

the guards. The train struck them from behind as a result of which they sustained serious injuries. In finding for them, the Court concluded that Metrorail's failure to warn the two guards of the unscheduled train was a matter of censure. The distinction is drawn on the basis that in the instant matter, there was a stop sign and railway crossing signing alerting the driver of the truck that he was approaching a railway crossing. Second, in the *Harrington* matter, although the basis for the finding of negligence on the part of Metrorail was not related to theconduct of the driver of the train, the Court considered his failure to apply the brakes when he saw the appellants for the first time and his sounding of the siren and waiting for them to react to it only did so after the collision as persuasive argument in favour of the driver's negligence.

[56] Again, counsel for the first plaintiff in persuading the court to find negligence on the part of the defendants sought support in the judgment of Constitutional Court judgment in *Dudley Lee v Minister of CorrectionalServices* [2012] ZACC 30. In the *Dudley* matter, the applicant was imprisoned in Pollsmor for a considerable period and contracted tuberculosis during such incarceration. In determining factual causation, the Court examined what the responsible authorities ought to

have done to prevent potential TB infection and whether that conducts had a better chance preventing infection than the conditions which actually existed during Mr Lee's incarceration and came to the conclusion that probable causation has been proved. I have held that the defendants took reasonable steps to guard against foreseeable harm to the public by installing a stop sign and a level crossing sign in line with the applicable prescripts. I do not consider the steps taken by the respondents as unreasonable. Neither can it be said that the failure to install booms is sufficiently linked to the accident that ensued. The fact is, the driver of the truck ought to have stopped and proceeded to cross only when he was satisfied that it was safe to do so.

CONCLUSION

[57] It is my judgment that on the evidence presented, the plaintiffs failed to establish negligence on the part of the train driver, Ms Mxhalisa and on the part of the defendants. The obvious result that ought to ensue is that the first and second plaintiff's claims be dismissed. Counsel for the defendant asked that should this be the result, the plaintiffs should be ordered to pay costs as is the norm, such costs to include the costs of two

counsel and the qualifying expenses of the defendant's expert , Mr Roodt. Although I am mindful of the general rule that costs follow the result, I am disinclined to make an order of costs against the plaintiffs. This is so because it is common cause in these proceedings that the plaintiffs are farm workers who were vindicating their rights. The litigation was in my view, neither frivolous nor vexatious. In line with the principle enunciated in *Biowatch Watch Trust v Registrar, Genetic Resources & others* 2009 (6) SA 232 (CC) at 245 C-249E the appropriate approach is to order each party to pay its own costs.

[11] In the result, the following order will issue:

1. The first and second plaintiffs' claim is dismissed.

2. Each party will pay its own costs including the qualifying expenses of each party's experts.

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JUDGE OF THE HIGH COURT